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No. 33

IN THE

Supreme Court of The United States

OCTOBER TERM, 1958

T. V. WILLIAMS, as State Revenue Commissioner,
Petitioner,

v.

STOCKHAM VALVES & FITTINGS, INC.,
Respondent.

BRIEF FOR RESPONDENT

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STOCKHAM VALVES & FITTINGS, INC.,

Respondent.

BRIEF FOR THE RESPONDENT

OPINION BELOW

The opinion of the Supreme Court of Georgia (R. 28-38) is reported at 213 Ga. 713, 101 S.E.2d 197.

JURISDICTION

Respondent concedes that the Supreme Court has jurisdiction of this matter.

QUESTION PRESENTED

The question presented is whether or not the State of Georgia may collect its general net income tax from respondent, whose connection with Georgia is limited to the activities of its sales representative and the operation of its sales service office in Atlanta, all of which activities are an integral part of interstate commerce:

(a) without violating the commerce clause of the Constitution of the United States; and

(b) without violating the due process clause of the Constitution of the United States.

STATUTES INVOLVED

The constitutional provisions and statutes involved are properly set forth in petitioner's brief, pages 3-4.

STATEMENT

The case was tried on an agreed Stipulation of Facts which is clear and concise. The stipulation appears in the Record before this Court (R. 1-13).[1] The facts may, however, be briefly summarized.

Respondent was a Delaware corporation with its principal office and manufacturing plant located in Birmingham, Alabama. It was engaged in the business of manufacturing and selling valves and pipe fittings (R. 2). Purchasers of respondent's products were located in all of the United States. Respondent operated five regional warehouses and thirteen sales service offices. It made sales only to established local wholesalers and jobbers (except for sales to makers of automatic sprinkler systems). These wholesalers and jobbers were in no way tied in or committed to respondent by any type of license or dealership arrangement (R. 3), and they usually handled competing products (R. 4).

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[1]References to the Record will be made in the usual manner. All italics in quoted material are added unless otherwise noted.

Respondent maintained a sales service office in Atlanta, Georgia, serving a territory comprising parts of five states (R. 5). One of its sales representatives used this office as headquarters and a woman secretary was employed there (R. 5, 6). The sales representative spent approximately one-third of his time in Georgia (R. 6).

The sales representative received orders, attempted to obtain new customers and to promote good will and in general carried on the usual activities of a salesman (R. 6-8). Any orders received by the sales representative or at the sales service office were forwarded to the Company's home office in Alabama for contractual acceptance or rejection. Some orders were rejected for credit or other reasons (R. 4, 7). All goods sold to Georgia customers were shipped on a "f.o.b. warehouse" basis (R. 5).

Except for a small amount of office furniture, equipment, supplies and advertising literature, respondent owned no property in Georgia (R. 8).

Respondent's sales representative had no authority to, nor did he accept any orders, enter into contractual obligations of any type or receive payment for goods. Respondent maintained no bank account in Georgia. All credit matters were passed on at respondent's home office and all collections were made by that office (R. 4, 9).

Except for the shipment of goods to customers in Georgia, the activities of respondent's sales representative and the operation of its sales service office in Atlanta, respondent had no connection with the State of Georgia.

The petitioner levied a net income tax against respondent based on the following provision of law:

> "The tax imposed by this law shall apply to the entire net income, as herein defined, received by every corporation, foreign or domestic, owning property or doing business in this State. Every such corporation

> shall be deemed to be doing business within this State *if it engages within this State in any activities or transactions for the purpose of financial profit or gain,* whether or not such corporation qualifies to do business in this State, and whether or not it maintains an office or place of doing business within this State, *and whether or not any such activity or transaction is connected with interstate or foreign commerce.*[1]

After deciding that respondent's activities in Georgia were covered by that definition, the petitioner determined the portion of respondent's income attributable to Georgia by applying a three factor ratio based on inventory, wages and gross receipts (R. 9-12). Respondent paid income taxes on the portion of its income so allocated to Georgia and duly filed claims for refund. Upon denial of these claims, suits for refund were filed. The trial court ruled against respondent (R. 13, 14). The Supreme Court of Georgia held that the Georgia income tax law as applied to respondent violated both the commerce clause and the due process clause of the federal constitution and reversed the trial court (R. 28-38). This Court granted certiorari (R. 39).

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[1]GA. CODE ANN., § 92-3113 (Supp. 1955).

SUMMARY OF ARGUMENT

Commerce Clause

1

All of respondent's activities within Georgia are directly connected with the interstate sale of its products. Such activities are carried on by its sales representative, or through the Company's sales service office in Atlanta where one secretary is employed. All of such activities are an integral part of interstate commerce. *Cheney Brothers Co. v. Massachusetts,* 246 U. S. 147 (1918).

2

Solely because respondent engages in interstate commerce in Georgia, it is required to pay the general state income tax. Since it engages in no local activities whatsoever, the tax is necessarily levied for the privilege of engaging in interstate commerce or it is levied on interstate commerce itself. Under either construction, the tax is a prohibited burden on interstate commerce. *Spector Motor Service* v. *O'Connor,* 340 U. S. 602 (1951).

3

Historically, interstate business has not been required to pay state income taxes solely on account of sales activity. Manufacturing companies, and particularly smaller companies, generally have manufacturing plants, offices where business is transacted, or warehouses in only a few states. Selling activity must, however, be carried on where the customers are located. Sales are not, nor can they be localized. Payment of net income taxes in every state in which a company carries on sales activity would be a tremendous burden on interstate commerce. The burden will be even greater because, as a practical matter, many apportionment formulae discriminate against foreign corporations.

The dictum appearing in *U. S. Glue Co.* v. *Oak Creek*, 247 U. S. 321 (1918), and the dicta appearing in subsequent cases are no longer persuasive. In those cases the taxpayers were engaged in manufacturing operations or other substantial local activity within the taxing jurisdiction. In view of the current rates of corporate income taxes and the high cost of complying with a multitude of different laws, the suggestion that a net income tax does not burden exclusively interstate commerce is not tenable. *Peck & Co.* v. *Lowe*, 247 U. S. 165 (1918), dealing with exports, and *Graves* v. *New York* ex rel. *O'Keefe*, 306 U. S. 466 (1939), dealing with taxes on salaries of government employees, are not in point.

Due Process Clause

5

The due process clause prohibits the taxation of a foreign corporation unless the corporation carries on substantial activities within the taxing jurisdiction. A sales representative's presence within the state for one-third of his time and the employment of one secretary at a sales service office is not a sufficient connection with the state to permit the imposition of a general income tax. *Miller Brothers Co.* v. *Maryland*, 347 U. S. 340 (1954).

6

The degree of activity which will subject a corporation to the jurisdiction of a state varies, depending on the particular obligation which the state seeks to impose on the corporation. Very slight activity will justify a suit on a contract which bears direct relation to the state. *McGee* v. *International Life Ins. Co.*, 355 U. S. 220 (1957). Relatively slight connections will support taxes on transactions which actually occur within the state, such as unemployment com-

pensation taxes based on employees' salaries earned within the state, *International Shoe Co.* v. *Washington*, 326 U. S. 310 (1945), or taxes on sales, *General Trading Co.* v. *State Tax Comm'n*, 322 U. S. 335 (1944).

Respondent's activities in Georgia are not, however, sufficient to subject it to a general income tax measured by a portion of its over-all profit which is related only indirectly, if at all, to respondent's activities in Georgia.

ARGUMENT

I

COMMERCE CLAUSE

1. All of respondent's activities within the State of Georgia are a part of and inseparable from interstate commerce and any income tax assessed against respondent is a direct burden on such commerce and violates the Commerce Clause of the Federal Constitution.

(A) ALL OF RESPONDENT'S GEORGIA ACTIVITIES CONSTITUTE INTERSTATE COMMERCE.

All of respondent's activities in Georgia related directly to the interstate sale of its products. It operated a sales service office in Atlanta (R. 5). One of its traveling sales representatives used that office as headquarters (R. 6). One woman secretary was employed in that office and a small amount of office furniture was maintained there (R. 5, 8). The representative carried on the ordinary duties of a salesman in Georgia (R. 6-8). No orders were, however, accepted in Georgia (R. 4). All sales were made on a "f.o.b. warehouse" basis and were completed at warehouses outside of Georgia by deliveries to customers or to common carriers consigned to customers (R. 5). All such sales took place outside of Georgia. *Parke, Davis & Co.* v. *Cook*, 198

Ga. 457, 31 S.E.2d 728 (1944); *appeal dismissed*, 323 U. S. 681 (1945).

Respondent had no other connection whatsoever with the State of Georgia.

Undoubtedly all of respondent's activities are an integral and inseparable part of interstate commerce. This Court has held that activities of this nature are interstate commerce in a situation where taxpayer had more local connections with the taxing state than in the instant case. *Cheney Brothers Co.* v. *Massachusetts*, 246 U. S. 147 (1918). There the Court briefly stated the facts as follows (p. 153):

> "This is a Connecticut corporation whose general business is manufacturing and selling silk fabrics. It maintains in Boston a selling office with one office salesman and four other salesmen who travel through New England. The salesmen solicit and take orders, subject to approval by the home office in Connecticut, and it ships directly to the purchasers. No stock of goods is kept in the Boston office, but only samples used in soliciting and taking orders. Copies and records of orders are retained, but no bookkeeping is done, and the office makes no collections. The salesmen and the office rent are paid directly from Connecticut and the other expenses of the office are paid from a small deposit kept in Boston for the purpose. No other business is done in the State."

The Court held (p. 153):

> "We do not perceive anything in this that can be regarded as a local business as distinguished from interstate commerce. The maintenance of the Boston office and the display therein of a supply of samples are in furtherance of the company's interstate business and have no other purpose. Like the employment of the salesmen, they are among the means by which that busi-

ness is carried on and share its immunity from state taxation. . . . We think the tax on this company was essentially a tax on doing an interstate business and therefore repugnant to the commerce clause."

The line of cases which limits the right of a state to impose license taxes on salesmen representing interstate concerns makes it clear that there is no local incident which may be carved out of the salesman's duties sufficient to support a tax on the interstate concern. As the Court recently said in *Memphis Steam Laundry* v. *Stone*, 342 U. S. 389, 393 (1952):

> "Whether or not solicitation of interstate business may be regarded as a local incident of interstate commerce, the Court has not permitted state taxation to carve out this incident from the integral economic process of interstate commerce. *As the Court noted last term in a case involving door-to-door solicitation of interstate business, 'Interstate commerce itself knocks on the local door.'*"

> "If the Mississippi tax is imposed upon the privilege of soliciting interstate business, the tax stands on no better footing than a tax upon the privilege of doing interstate business. A tax so imposed cannot stand under the Commerce Clause. *Spector Motor Service* v. *O'Connor*, 340 U. S. 602, 608-609 (1951), and cases cited therein."

Also see *Nippert* v. *Richmond*, 327 U. S. 416 (1946); *Robbins* v. *Shelby Taxing District*, 120 U. S. 489 (1887).

The stipulation states that all of respondent's orders were accepted or rejected at its home office in Alabama and delivery made f.o.b. warehouse outside Georgia to the customer or to common carriers for shipment to the customer (R. 4-5). Respondent's only activity within the State of Georgia consisted of the operation of its Atlanta sales serv-

ice office and the activities of its sales representative. Under the foregoing authorities, it is well settled that all of such activities are an integral part of interstate commerce. The case, therefore, narrows itself to the proposition:

(B) A State May Not Impose an Income Tax on Interstate Commerce Where the Taxpayer Engages in no Local Activities Whatsoever.

The fundamental limitations of the commerce clause on state taxation were established many years ago by this Court. They were well stated in *LeLoup* v. *Port of Mobile*, 127 U. S. 640, 648 (1888):

> "In our opinion such a construction of the Constitution leads to the conclusion that no State has the right to lay a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on, and the reason is that such taxation is a burden on that commerce, and amounts to a regulation of it, which belongs solely to Congress."

Although the guiding principles were established by this Court soon after the founding of the Republic and have been consistently adhered to, it is difficult, if not impossible, to reconcile all of the various decisions on this complex subject. In this mass of decisions dicta can be found to support almost any conceivable position. It will be our effort here to point out the cases most nearly controlling in their factual patterns and to emphasize particularly the more recent decisions of this Court.

The recent decision most nearly controlling in the instant case is *Spector Motor Service* v. *O'Connor*, 340 U. S. 602 (1951). There taxpayer operated a freight line which picked up freight in Connecticut for delivery outside the state and delivered freight from outside the state to cus-

tomers in Connecticut. The Court held that taxpayer's terminal activities, pick-up service and other activities incident to the transportation of freight were integral parts of interstate commerce. The Court found that taxpayer engaged in no intrastate activities whatsoever. As the Court said (p. 606): "*The incidence of the tax is upon no intrastate commerce activities because there are none. Petitioner is engaged only in interstate transportation.*" The tax in question had been construed by the Supreme Court of Connecticut as an "excise upon the franchise of corporations for the privilege of carrying on or doing business in the state" measured by net income reasonably attributable to the state.[1] This Court accepted that construction. The tax did not discriminate against interstate commerce, nor was the method of allocating a share of taxpayer's income to Connecticut unreasonable. The sole issue in the case was whether or not such a tax computed by petitioner's net income could be assessed against a business which was engaged exclusively in interstate commerce. The Court said (p. 609):

> "This Court heretofore has struck down, under the Commerce Clause, state taxes upon the privilege of carrying on a business that was *exclusively* interstate in character. The constitutional infirmity of such a tax persists no matter how fairly it is apportioned to business done within the state. *Alpha Portland Cement Co.* v. *Massachusetts*, 268 U. S. 203 (measured by percentages of 'corporate excess' and net income); *Ozark Pipe Line Corp.* v. *Monier*, 266 U. S. 555 (measured by percentage of capital stock and surplus). See *Interstate Pipe Line Co.* v. *Stone*, 337 U. S. 662, 669, et seq. (dissenting opinion which discusses the issue on the assumption that the activities were in interstate commerce); *Joseph* v. *Carter & Weekes Co.*, 330 U. S. 422; *Freeman* v. *Hewit*, supra." (Emphasis by the Court).

[1] *Spector Motor Service* v. *O'Connor*, 340 U. S. 602, 606 (1951).

There is no possible distinction between the *Spector* case and the instant case unless reliance is to be placed solely on a matter of labels. When the *Spector* case was before the Court of Appeals for the Second Circuit, it discussed the question of whether or not the issue was one of labels or one of substance, as follows:[1]

> "The tax would certainly be the same under various other labels, *such as a net income tax,* a corporation business tax, or what not. The label as chosen seems obviously designed to express the purpose and the fair rationale behind the state's revenue program; it would be ironic were this to be held to defeat the tax as against, say, the cruder tax upheld in the Interstate Oil Pipe Line Co. case. *If anything, the label here should be an aid, rather than a drawback, to its view in proper perspective.*"

This Court itself stated that it was not dealing with a matter of labels. It said (p. 608):

> "The answer in the instant case has been made clear by the courts of Connecticut. *It is not a matter of labels.* The incidence of the tax provides the answer."

Realistically, there can be no difference between a franchise tax measured by net income and a net income tax. The tax is precisely the same amount. It is collectible in precisely the same way. It has precisely the same economic effect on the taxpayer. Unless the Court is willing to say that use of the word "*franchise*" is the sole and only basis for distinction, then we respectfully submit that this case is controlled by the *Spector* case and that the Georgia income tax must be held to impose a direct burden on interstate commerce.

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[1] *Spector Motor Service* v. *O'Connor,* 181 F. 2d 150, 156 (2nd Cir. 1950).

Except for *Spector*, no other decision of this Court rules on the question of whether or not a state may impose a tax measured by net income on a business engaged exclusively in interstate commerce. We do not understand petitioner to claim that there is such a decision.

We will admit that dicta from some cases decided in the Nineteen Thirties tend to support the proposition that an income tax is valid. A number of earlier cases, however, clearly indicate that a net income tax on exclusively interstate commerce is invalid, and these earlier decisions, rather than those of the Nineteen Thirties, involve more nearly analogous factual situations. As the Court recently said:[1]

> "The history of this problem is spread over hundreds of volumes of our Reports. To attempt to harmonize all that has been said in the past would neither clarify what has gone before nor guide the future. Suffice it to say that especially in this field opinions must be read in the setting of the particular cases and as the product of preoccupation with their special facts."

In *Alpha Portland Cement Co.* v. *Massachusetts*, 268 U. S. 203 (1925), a Massachusetts excise tax based on the proportion of a company's assets employed in the state *and the proportion of its net income derived in the state* was held unconstitutional as applied to a taxpayer engaged exclusively in interstate commerce. Taxpayer maintained a branch sales office in Massachusetts which was used as headquarters by its traveling salesmen. It owned office equipment there and its local manager handled petty cash items for the company through a bank account maintained in his own name. The Court found that all of taxpayer's activities were an integral part of interstate commerce and therefore held the excise unconstitutional.

The Court said (p. 218):

"The local business of a foreign corporation may

[1] *Freeman* v. *Hewit*, 329 U. S. 249, 252 (1946).

support an excise measured in any reasonable way, if neither interstate commerce nor property beyond the state is taxed. *Underwood Typewriter Co.* v. *Chamberlain*, 254 U. S. 113, approved *such an excise measured by income reasonably attributed to intrastate business;* but nothing there said was intended to modify well-established principles. It must be read with the essential facts in mind. *Local business was a sufficient basis for the excise, and there was no taxation of interstate commerce or property beyond the State.* Of course, the opinion does not support the suggestion that the present statute is free from the fatal objections to the former one because payment of the tax is no longer a condition precedent to carrying on any business."

"Local business was a sufficient basis for the excise" [a net income tax] in *Underwood*, which is discussed in more detail, *infra*, page 43, but what basis is there for the income tax Georgia seeks to collect? There is no basis for the tax except interstate commerce, because all of respondent's business in Georgia is interstate commerce. It had no local business.

Further, *Alpha Portland Cement* lays to rest any contention that a net income tax on interstate commerce may be upheld solely because it is not a condition precedent to doing the interstate business. This Court said that, "of course," it "does not support the suggestion. . . ." If an excise tax measured by net income is not a condition precedent to doing business, then the only difference between it and a net income tax is one of labels. Both taxes are a certain percentage of net income. Both are payable in the same manner with the same money at the same time. The only difference is one of names.

A franchise tax "for the privilege of exercising its corporate franchises within this state, *a tax according to or measured by its net income,*" was before this Court in

Matson Navigation Co. v. *State Board*, 297 U. S. 441 (1936). Taxpayer did some intrastate business. The statute exempted from taxation all taxpayers who were engaged exclusively in interstate commerce. Taxpayer contended that this exemption was arbitrary and unreasonable and violated the equal protection clause of the Federal Constitution. In dealing with this contention, this Court held (p. 446):

> "There is no merit in the suggestion that failure of the act to extend to foreign corporations exclusively engaged in interstate or foreign commerce in California constitutes an unconstitutional discrimination against appellants. *A foreign corporation whose sole business in California is interstate and foreign commerce cannot be subjected to the tax in question. Alpha Cement Co.* v. *Massachusetts*, 268 U. S. 203, 216 et seq., *Anglo-Chilean Nitrate Corp.* v. *Alabama*, supra. The submission by the State to the commerce clause cannot be held to violate the equal protection clause."

Also see *Anglo-Chilean Nitrate Sales Corp.* v. *Alabama*, 288 U. S. 218 (1933), and *Atlantic Lumber Co.* v. *Comm'r*, 298 U. S. 553, 555 (1936).

The conclusion that a net income tax on exclusively interstate commerce is unconstitutional is strengthened by an analysis of related lines of cases. In *Ozark Pipe Line Corp.* v. *Monier*, 266 U. S. 555 (1925), this Court considered an annual franchise tax which was measured by the value of the taxpayer's capital stock and surplus employed in business within the state. Taxpayer operated an interstate pipe line through Missouri, but made no pick-ups or deliveries in Missouri. Taxpayer's main offices, home office personnel, trucks and compressor stations were located in Missouri. The court said (p. 565):

> "*The business actually carried on by appellant was exclusively in interstate commerce.* The maintenance of an office, the purchase of supplies, employment of

labor, maintenance and operation of telephone and telegraph lines and automobiles, and appellant's other acts within the State, were all exclusively in furtherance of its interstate business; and the property itself, however extensive or of whatever character, was likewise devoted only to that end. They were the means and instrumentalities by which that business was done and in no proper sense constituted, or contributed to, the doing of a local business. *The protection against imposition of burdens upon interstate commerce is practical and substantial and extends to whatever is necessary to the complete enjoyment of the right protected.*"

The Court proceeded to hold the tax unconstitutional.

This Court has consistently held that a state may not impose a license tax on interstate commerce. The limits of a state's authority to impose license taxes were very clearly stated in *Cooney* v. *Mountain States Tel. and Tel. Co.*, 294 U. S. 384 (1935), where a license tax on telephones was at issue. The Court said (p. 393):

> "Where the tax is exacted from one doing both an interstate and intrastate business, it must appear that it is imposed solely on account of the latter; that the amount exacted is not increased because of the interstate business done; *that one engaged exclusively in interstate commerce would not be subject to the tax;* and that the one who is taxed could discontinue the intrastate business without also withdrawing from the interstate business."

More recently in *West Point Wholesale Grocery Co.* v. *Opelika*, 354 U. S. 390 (1957), this Court invalidated a city license tax, saying (p. 391):

> "We held in *Nippert* v. *Richmond*, 327 U. S. 416, and in *Memphis Steam Laundry Cleaner, Inc.* v. *Stone*,

342 U. S. 389, that a municipality may not impose a flat-sum privilege tax on an interstate enterprise whose only contact with the municipality is the solicitation of orders and the subsequent delivery of goods at the end of an uninterrupted movement in interstate commerce, such a tax having a substantial exclusory effect on interstate commerce. In our opinion the tax here in question falls squarely within the ban of those cases."

Attempts to impose gross receipts taxes on businesses engaged in interstate commerce have also given rise to a great deal of litigation. It is settled that such taxes as applied to interstate commerce constitute a direct burden on such commerce and are unconstitutional. *Railway Express Agency, Inc.* v. *Virginia*, 347 U. S. 359 (1954). In question there was the Virginia gross income tax as applied to Railway Express, all of whose activities within the State of Virginia were a part of interstate commerce. The Court said (p. 367):

"It contends that this obvious burden on interstate commerce is validated by state protection of a localized incident in the course of the business. The three incidents are originating the interstate movement, which requires local pickup of the parcels; terminating the movement, which requires delivery, and movement through the State. If each of these incidents is sufficient warrant for taxing gross revenues from wholly interstate commerce, a concern doing a nationwide business is vulnerable to a gross-revenue tax in every one of the forty-eight states. But it is argued that this is permissible, provided the states formulate their burden so as each to burden it proportionately, not encroaching on the other's right to burden. *It is enough to say that we recently have ruled that local incidents such as gathering up or putting down interstate commodities as an integral part of their interstate move-*

ment are not adequate grounds for a state license, privilege or occupation tax."

The first case cited by the Supreme Court in support of the foregoing statement was *Spector Motor Service* v. *O'Connor*, 340 U. S. 602 (1951). As hereinbefore discussed, the *Spector* case involved a tax measured by net income from interstate commerce.

The validity of gross income taxes was discussed at great length by this Court in a very close decision rendered a few years prior to the *Railway Express* case. *Interstate Oil Pipe Line Co.* v. *Stone*, 337 U. S. 662 (1949). Mississippi imposed an "annual privilege tax . . . equal to 2% of the gross income" upon persons operating a pipe line for transportation of gas from one point to another within the State of Mississippi. Taxpayer collected gas in its pipe lines within the state and delivered the gas to railroad terminals, whence it was shipped outside the state. Four Justices of this Court were of the opinion that the tax was valid whether or not taxpayer was engaged in interstate commerce. A fifth Justice was of the opinion that no interstate commerce was involved and therefore voted to uphold the tax. Four Justices, however, dissented, taking the view that taxpayer's activities were exclusively in interstate commerce and that the tax as applied to interstate commerce was invalid. Since the *Railway Express* case holds that a fairly apportioned gross income tax applied to exclusively interstate commerce is unconstitutional, and since the *Interstate Oil Pipe Line* dissenting opinion was recently cited with approval by a majority of the Court in *Spector*, it is entitled to great weight.

Justice Reed, speaking for the minority in the *Interstate Oil Pipe Line* case, said (p. 677):

> "The cases hold not only that a state may not exact a tax as a condition precedent to the doing of interstate business, but also that it may not levy privilege, *excise*

or franchise taxes *on a foreign corporation for* the privilege of carrying on *or the actual doing of solely interstate business after its admission to the state.*"

and added in a footnote:

"Since we perceive no difference for the purposes of this case between franchise, privilege, and *excise taxes*, insofar as they are exacted for the privilege of doing *or the doing of interstate business*, we have treated them as identical as far as their validity under the commerce clause is concerned. In *Ozark* and *Anglo-Chilean Nitrate* the taxes were called franchise taxes; in *Alpha* it was labeled an excise tax."

The opinion continued (p. 679):

"Where the corporate taxpayer conducts intrastate as well as interstate business, a franchise, privilege or excise tax on the former is of course permissible. We have frequently upheld such a tax although it was measured by property or receipts which were used in or attributable to interstate business. . . ."

(p. 680): "Notwithstanding the wide latitude for taxation of incidents connected with interstate commerce, see *Memphis Gas Co.* v. *Stone*, 335 U. S. 80, this Court has never interpreted the commerce clause to allow a state tax for the privilege of carrying on interstate commerce or one upon that commerce itself. *Joseph* v. *Carter & Weekes Co.*, 330 U. S. 422. This is not because of the financial burden. Other taxes may equally burden the commerce. It is not because in transportation the same result cannot be obtained by levying a tax for intrastate activities measured by gross receipts appropriately apportioned to the activities in the state. *It is because the commerce clause of the Constitution does not leave to the states any power to permit or refuse the carrying on of interstate commerce.* It like-

wise bars a state from taxing the privilege of doing interstate commerce *or the doing of interstate commerce, with or without fair apportionment even if not discriminatory.* . . ."

(p. 681): "All interstate commerce thus has free access to local markets, subject only to non-discriminatory taxes such as the tax on apportioned gross receipts from *intrastate* mileage as in *Central Greyhound Lines* v. *Mealey, supra,* or the tax on disconnected local incidents as discussed in the opinions in *Memphis Gas Co.* v. *Stone, supra,* or in *International Harvester Co.* v. *Evatt, supra,* or *American Manufacturing Co.* v. *St. Louis,* 250 U. S. 459. So long as a tax on the privilege of doing interstate business *or a tax on the doing of that business is prohibited,* interstate commerce remains free from state exactions levied on that commerce."

The foregoing opinion contains a keen analysis of the earlier cases and most nearly reconciles their conflicting statements. Its reasoning provides a fair and workable guide for the future. Without qualification, it rules that a state may not levy an "excise . . . on a foreign corporation for . . . the actual doing of solely interstate business. . . ."

The Supreme Court of Georgia held in the instant case that the Georgia income tax *"is in the nature of an excise tax"* (R. 35). Although writers and the courts often use loose language, a net income tax is ordinarily classified as an excise tax.[1] Basically, there are only two broad categories of taxes—property taxes and excise taxes. Thus, this Court in *Alpha Portland Cement Co.* v. *Massachusetts,*[2]

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[1]"Many, perhaps most, courts hold that a net income tax is to be classified as an excise." *Hale* v. *State Board,* 302 U. S. 95, 104 (1937).

[2]268 U. S. 203 (1925).

referred to the Connecticut net income tax as an excise tax when it said (p. 218):

> "*Underwood Typewriter* . . . approved such an *excise* measured by income reasonably attributed to intrastate business."

Respondent does nothing in Georgia except interstate commerce. Because it engages in such commerce, it must pay the Georgia income tax. Using words in their non-technical sense, respondent must pay the Georgia income tax for the privilege of doing interstate commerce in Georgia, or it must pay the tax because it engages in that commerce. To say that the tax is not levied for the privilege of doing commerce, nor is it levied on that commerce leaves nothing on which the tax can operate. Whether the excise be called a privilege tax, a franchise tax or an income tax, it has the identical effect. We urge that under the circumstances of this case any general excise measured by net income is a prohibited burden on interstate commerce.

2. State income taxes, as historically construed and administered, have not burdened interstate commerce.

The earliest state income tax on corporations is less than fifty years old.[1] Sixteen states had adopted corporate income taxes by 1929. Today, thirty-five states, the District of Columbia, and Hawaii have laws imposing net income taxes on corporations.[2] Generally speaking, no states attempted to collect income taxes from companies engaged only in sales activities until the early 1940's. California first construed its corporate income tax to apply to sales activities. Georgia has followed California's lead as have Louisiana, Minnesota, Oregon and Mississippi.

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[1] Wisconsin adopted a corporate income tax in 1911.

[2] P-H State & Local Taxes, All State Tax Guide, Par. 1046 (1958). (In addition, Indiana imposes a gross income tax on corporations).

Since so few states have attempted to collect income taxes from corporations who limited their activity within the state to the solicitation of sales, the problem is relatively new. At present the majority of companies pay income taxes in only one, two or three states. Various surveys bear out this conclusion.

The results of a recent survey conducted by the National Association of Manufacturers among its Taxation Committee are set out in detail in the *amicus curiae* brief filed herein by the Association. It will be noted that a very simple questionnaire was sent to about three hundred business concerns. Only three questions were asked. The first question asked for the company's annual gross sales. The second question asked in how many states did the "company have salesmen or did salesmen representing your company travel with some degree of regularity." The third question asked in how many states did the company "file tax returns measured by net income" during the past year. The one hundred thirty-nine replies to this questionnaire are quite revealing. Sixty-six companies paid income taxes in five states or less. Yet out of this same sample, one hundred two companies had salesmen who traveled with some degree of regularity in twenty-one or more states during the past year.

The statistics are even more revealing when one considers only the smaller companies. Of the sixty-five companies having gross annual sales of less than $25,000,000 replying to the survey, only twenty-one paid income taxes in more than three states. Only twelve companies paid taxes in more than five states. Forty-one companies paid taxes in one state or less. Yet of these same companies, thirty-seven had salesmen who traveled in more than twenty-one states with some degree of regularity during the past year.

Respondent's activities fall into the same pattern. The Record indicates that it has customers in all of the United

States. It operates thirteen sales service offices. It has plants or warehouses in only five states (R. 3). The only states in which it pays taxes measured by net income, other than Georgia, are Alabama, California and Pennsylvania (R. 11-12). In each of those states it operates a warehouse (R. 2-3). Except for the District of Columbia franchise tax, it pays no other taxes measured by net income (R. 12).

Whatever may be the reasons therefor, it is abundantly clear that as of today interstate businesses do not, nor have they ever in the history of the United States been required to pay net income taxes in a substantial number of jurisdictions. Assuming that there are more small and medium-sized companies than giant corporations, it is entirely fair to say that the vast majority of interstate businesses have not paid income taxes in more than three states. Among the small and medium-sized companies, almost none pay income taxes in more than three states.

On the other hand, the very same companies carry on regular sales solicitation in most of the United States. If this solicitation is sufficient to subject a corporation to a state's net income tax,[1] the typical corporation will be required to pay thirty-five or more state net income taxes as opposed to the present practice of paying one to three. The next section of this brief will consider the effect of such a change.

[1]No constitutional distinction has ever been drawn between the regular activities of salesmen who travel out of their homes and the same activities of salesmen who have an office in the state. *Cheney Brothers Co. v. Massachusetts*, 246 U. S. 147 (1918), and the long line of cases which follow it, hold that all such activities are part of interstate commerce and entitled to its protection.

3. If solicitation of sales alone will subject interstate commerce to state income taxes, the burden will be heavy.

Whether the imposition of income taxes by the several states amounts to a proscribed burden on interstate commerce does not depend on highly theoretical concepts. It is a very practical question. As Justice Holmes said: "Regulation and commerce among the States both are practical rather than technical conceptions, and, naturally, their limits must be fixed by practical lines."[1] To fix the line, one must consider the nature of state income taxes and their probable effect on commerce.

Thirty-five states, Hawaii, and the District of Columbia, levy taxes measured by net income on corporations.[2] For purposes of this discussion, we make no effort to classify various state taxes as direct net income taxes, franchise taxes measured by net income, or other forms of taxes measured by net income. It is fair to assume that if the Court upholds a general net income tax of any type, the states will rapidly amend their laws to provide the proper labels.

What effect will thirty-five income taxes have on interstate business? While there will be other effects, the most obvious one is the amount of taxes that an interstate business will be required to pay. To begin with, the state of a corporation's domicile can apparently tax 100% of its net income. As this Court said in *Lawrence* v. *State Tax Comm'n*, 286 U. S. 276, 279 (1932): "domicile in itself establishes a basis for taxation."

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[1] *Galveston, H. & S. A. Ry.* v. *Texas*, 210 U. S. 217, 225 (1908).

[2] P-H State & Local Taxes, All States Tax Guide, Par. 1046 (1958).

New Jersey is included, although its income tax will not be effective until 1959.

In his brief (pp. 10, 50), petitioner recognizes the taxing power of the state of domicile, but he argues that multiple taxation of interstate commerce does not violate the Constitution. He further argues that if multiple taxation should be found to violate the Constitution, the power of the state of domicile should be limited. To support this argument he points to *Standard Oil Co.* v. *Peck*,[1] which requires apportionment of property taxes levied by the home port of a vessel moving on inland waterways. An attempt to apply the home port rule to income taxes, however, runs counter to *U. S. Glue* v. *Oak Creek*,[2] the case upon which petitioner so heavily relies. There taxpayer was a domestic corporation with its principal manufacturing plant located within the state. The question before the Court was whether or not the state could tax income derived from (a) goods manufactured in the state and sold to customers outside of the state but delivered from a factory in the state; and (b) goods manufactured in the state and "sold to customers outside of the State, the sales having been made and goods shipped from plaintiff's branches'"[3] outside the state. Thus, the taxpayer not only negotiated the second category of sales outside the state, but the actual sales apparently took place beyond its borders. The Court held that the state could tax all of the net income from these sales. It is clear therefore that the solicitation of orders in foreign states does not remove any of a company's income from the grasp of the domiciliary state.

We start with the proposition, therefore, that the domiciliary state may constitutionally tax 100% of a corporation's net income. State income taxes assessed purely on account of sales activity start into the second 100%. How much would those taxes be?

In a unitary business carried on in a number of states,

[1] 342 U. S. 382 (1952).
[2] 247 U. S. 321 (1918).
[3] *Id.* at 325.

it is impossible to separate with any degree of certainty the particular activity or activities which lead to a given amount of profit. By necessity the states have been forced to adopt some type of apportionment formula in order to arrive at the portion of an interstate concern's net income which is attributable to activities within the state.

'Since there is no conclusive way to determine the weight which should be given any particular element, the courts have upheld apportionment formulae unless they are shown to be clearly arbitrary and unreasonable. In *Underwood Typewriter Co.* v. *Chamberlain*, 254 U. S. 113 (1920), this Court found that a Connecticut taxpayer had failed to prove that an apportionment formula based solely on the location of its real estate and tangible personal property was arbitrary. In *Butler Brothers* v. *McColgan*, 315 U. S. 501 (1942), this Court considered the California apportionment formula based on an average of three ratios—tangible property, wages and gross sales. In upholding the formula, this Court said (p. 507):

> "One who attacks a formula of apportionment carries a distinct burden of showing by 'clear and cogent evidence' that it results in extra-territorial values being taxed."

In view of the liberal attitude adopted by the courts, it is not surprising that the states have adopted a wide variety of apportionment formulae.

Prentice-Hall has prepared a comprehensive chart which purports to be a guide to the ratios used to apportion net income to the states and territories which levy income taxes.[1] This chart is reproduced at page 61 of the Appendix

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[1] P-H STATE & LOCAL TAXES, All States Report Bulletin No. 34, par. 34.1, March 4, 1958. Substantially the same information is available in permanent but somewhat more complicated form. P-H STATE & LOCAL TAXES, ALL STATES TAX GUIDE, Par. 1046 (1958).

to this brief. The first three columns in the chart list the most common ratios—property, receipts and payroll. Of the thirty-five states which levy an income tax,[1] thirty-two employ a property ratio. Thirty-four states employ a gross receipts ratio. Twenty-three states employ a payroll ratio. The fourth column is denominated "others." Under that column are references to twenty-one footnotes which describe special provisions in particular state laws. The fifth column, by means of references to twenty footnotes, is a guide to the particular items of income which a corporation may allocate separately before applying the apportionment formula in a given state. Finally, there is a column which shows whether or not a state permits separate accounting for in-state activities in lieu of the apportionment formula.

The foregoing tabulation is complicated enough, but curiously, it results in an over-simplification of the problem. The great majority of the states use a property, receipts or payroll ratio, or some combination of those three. The reason for the deception is apparent when one analyzes the interpretations placed on a particular ratio by the various states.

At page 63 of the Appendix is a second chart prepared by Prentice-Hall.[2] It offers a guide to the meaning of the receipts ratio as construed by the states which use it. There are six principal ways of determining the location of a receipt. These are (1) office where the sale is negotiated; (2) location of the property at time of order; (3) place of receipt or acceptance of order; (4) location of negotiating personnel; (5) place of delivery; and (6) place

[1] Although the New Jersey income tax which becomes effective in 1959 is not included in the chart, information concerning that tax is included in the discussion which follows.

[2] P-H State & Local Taxes, All States Tax Guide, Par. 1947 (1958).

of shipment. As previously stated, thirty-four states employ a receipts ratio in allocating taxable net income. The combinations and permutations of factors used by the various states in defining the sales which are to be included in the numerator of the receipts ratio are endless. From a reference to the foregoing chart, it would appear that the average state uses two or three of the criteria mentioned above. In addition, there is a final column on the chart for other means of allocating sales which, by reference to seven footnotes, establishes other criteria in use.

An example can best illustrate what can happen with respect to one particular transaction. A salesman negotiates a sale in California, thus requiring the allocation of receipts from the sale to the numerator of the California ratio, which is based solely on the location of the negotiating personnel. The salesman's home office was located in Minnesota, which would likewise cause the receipts from the sale to be allocated to that state, which bases its formula principally upon the office from which the sale was negotiated. If the goods were shipped from Virginia, the same receipts would be included in the Virginia ratio, which requires the inclusion of all receipts from goods shipped out of Virginia. If the customer took delivery of the goods in Georgia, the same receipts would be included in the Georgia ratio, which is based on the destination theory. If the order, after being negotiated, was finally received and accepted at the company's New York office, the receipts must be included in the New York ratio, which is based on the place of acceptance of the order. If by some peculiarity the goods were located in Oregon at the time the order was received, that state could likewise include the receipts in the numerator of its ratio. It is not necessary to exhaust every possible place where receipts from a hypothetical transaction could be used in the numerator of an apportionment ratio in order to illustrate the duplication of taxes and complications involved.

Nor is the problem limited to the location of gross receipts.

Prentice-Hall has developed complicated charts[1] which attempt to correlate the various factors used by the states in opportioning wages. The first chart appears at page 65 of the Appendix and lists seven criteria which determine the wages which must be included in the numerator of the apportionment ratio. These criteria include the location of the company's local office, regional office, or home office; the time spent by the employee in the state; and the employee's mileage within the state.

The second chart (page 66 of the Appendix) covers the types of employees whose wages must be included in the payroll ratio and the types of compensation to be included. In the first category there is a division among the states as to the inclusion of officers' salaries, directors' salaries or independent agents' salaries. In the second category there is no uniformity as to the inclusion of commissions paid, bonuses, reimbursement for board and lodging and several other types of compensation. By a checkmark under "other types of compensation" opposite every state which uses a payroll factor, Prentice-Hall indicates that there are special rules in each such state.

With respect to each state which uses a payroll factor, an interstate company must, therefore, find out whether to allocate its payrolls to the office out of which the employee works or whether the payroll can only be allocated to its chief headquarters; or perhaps payrolls must be allocated on the basis of time spent by the employee in the state or based on mileage or on other factors. Thus for each state, it must break down both the numerator and denominator of the payroll ratio so as to include or exclude payments to

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[1] P-H State & Local Taxes, All States Tax Guide, Par. 1048 (1958).

officers, directors or independent agents. It must likewise, from state to state, include or exclude commissions, bonuses, reimbursement for traveling and lodging and other types of compensation. Once again, the permutations and combinations are endless.

Likewise, among the states that use a property factor, there are many variables. Georgia bases its ratio exclusively on inventory. Other states use all real estate and tangible personal property. Still other states use combinations thereof.

There is no consistency in any of the foregoing allocation procedures. Each state decides what ratios to use and then decides how to define its ratios. In the preface to the leading treatise on allocation of income in state taxation,[1] the authors describe their efforts to prepare charts covering the various state allocation formulae. After noting that the differences in the state laws far outnumbered the similarities, they continued:[2]

> "The result was that nearly every chart became little more than a mass of footnotes, wholly unrelated among themselves, like an animal with a thousand appendages, all different, and no body. Of the numerous charts that were prepared, covering every phase of the problem, only the few given in this book presented any semblance of order. It was order of some kind which the authors had tried to discover. What they found was the utter chaos which experience had warned them to expect. As far as taxes were concerned, it seemed, the states were still in the days of proud diversity under the Articles of Confederation. Interstate commerce was still plagued by the boundary lines between the states."

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[1] ALTMAN & KEESLING, ALLOCATION OF INCOME IN STATE TAXATION (2d ed. 1950).

[2] *Id.* at 3.

Out of the mass of conflicting state laws, one significant trend does, however, appear. Most states design their allocation formulae to yield maximum revenue from interstate commerce. Formulae can be heavily weighted against commerce without overstepping the bounds sanctioned by the courts. The trend in this direction is not surprising. As long ago as the earliest drummer cases, states have attempted to discriminate against interstate commerce. Corporations, and particularly interstate corporations, are still a most popular source of revenue.

Ways in which allocation formulae can be weighted against commerce are legion. For example, Georgia, which has relatively little manufacturing, uses an inventory ratio[1] rather than a ratio based on real estate and tangible property. Since it is a branch office and warehouse state, this ratio works in its favor. Further, it uses the destination theory in its gross receipts ratio.[2] All sales to Georgia customers are included in the numerator without regard to the origin of the goods, the place where the sale was negotiated, or the place where the sale took place. Georgia gets the benefit of all goods shipped into the state even though the sale may have no connection with the state.

New York has adopted a gross receipts factor based on the location of the office where orders are accepted. This weights the factor in its favor at the expense of the many concerns which have their principal sales offices located in New York City. Connecticut and other manufacturing states have used an allocation formula based solely on the location of real estate and tangible personal property.[3]

The conclusion is, therefore, inescapable that within the limits of permissible allocation formulae, interstate busi-

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[1] GA. CODE ANN., § 92-3113(4)(a) (Supp. 1955).

[2] *Id.* § 92-3113(4)(c).

[3] *Underwood Typewriter Co.* v. *Chamberlain*, 254 U. S. 113 (1920).

nesses will be forced to pay net income taxes on many times their total net income.

The scholars and writers in the field of interstate commerce law have from time to time attempted to bury the "multiple burden" doctrine and substitute various other tests to determine whether or not a taxing state violates the commerce clause. Laying aside the changing verbiage used from time to time, the very heart of the question and the very reason which caused the commerce clause to be included in our Constitution was the necessity for free trade among the states. If several states may tax the profits of interstate concerns, commerce between the states will certainly be discouraged. As recently as *Michigan-Wisconsin Pipe Line Co.* v. *Calvert*, 347 U. S. 157 (1954), the Court said (p. 170):

> "Here it is perhaps sufficient that the privilege taxed, namely the taking of the gas, is not so separate and distinct from interstate transportation as to support the tax. But additional objection is present if the tax be upheld. *It would 'permit a multiple burden upon that commerce,' Joseph* v. *Carter & Weekes Stevedoring Co., supra*, at 429, for if Texas may impose this 'first taking' tax measured by the total volume of gas so taken, then Michigan and the other recipient states have at least equal right to tax the first taking or 'unloading' from the pipeline of the same gas when it arrives for distribution. Oklahoma might then seek to tax the first taking of the gas as it crossed into that State. The net effect would be substantially to resurrect the customs barriers which the Commerce Clause was designed to eliminate. 'The very purpose of the Commerce Clause was to create an area of free trade among the several States. *That clause vested the power of taxing a transaction forming an unbroken process of interstate commerce in the Congress, not in the*

States.' McLeod v. *Dilworth Co.*, 322 U. S. 327, 330-331 (1944)."

Taxation by the states and territories is not the only problem faced by interstate commerce. In several states municipalities are permitted to levy income taxes. Municipal income taxes have existed in Ohio for a number of years. A recent survey[1] indicated that thirty Ohio municipalities have income taxes presently in effect.

At its 1957 Session, the General Assembly of Ohio enacted a bill limiting the power of municipalities to levy income taxes.[2] The bill provided that no Ohio municipality could levy an income tax unless it adopted a standard method of allocation set out in the bill. This method provided that corporations doing business within and without a city should, if practical, use separate accounting to determine their profits within the municipality. If separate accounting was not practical, the bill provided an apportionment formula composed of an average tangible property ratio, a salaries and wages ratio, and a gross receipts ratio. As usual, the gross receipts ratio was quite complicated.

The City of Louisville, Kentucky, imposes a one and one-quarter per cent net income tax on all business activities carried on within the city.[3] St. Louis, Missouri, imposes an income tax at the rate of one-half of one per cent on all business or other activities conducted in the city.[4] Both of these city income taxes require annual returns.

Generally speaking, a state may delegate any or all of its powers of taxation to municipalities or other political

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[1]State Taxation of Interstate Transactions prepared for The Valve Manufacturers Association by Donovan, Leisure, Newton and Irvine, June 1, 1958 (The Grosby Press), page 68.

[2]Laws of Ohio, Regular and First Special Session 1956-1957, at 91.

[3]Louisville Ord. No. 83, Ser. 1950.

[4]St. Louis Ord. No. 47063.

subdivisions. If the states have the power to levy income taxes on foreign corporations whose only activities within the state consist of the solicitation of sales, there is nothing to prevent their delegating this same power to municipalities. Evidently this has already been done on a broad scale in Ohio. With increasing needs for revenue, more and more cities can be expected to enact income taxes. The probability of multiple taxation of interstate business will increase in direct proportion to the increase in the number of tax gatherers.

Multiple taxation is only the beginning. Just to catalogue the various criteria used to allocate income points up the tremendous burden which will result from efforts to comply with these laws. The interstate company must first obtain an analysis of the income tax laws of all the states in which it carries on sales activities. Based on these laws, it must tabulate the criteria by which income is allocated to each of those states. It must then set up record-keeping procedures so that this information will be available at the end of the year. Sales must be tabulated by origin, destination, place of goods when ordered, location of negotiating personnel, location of office out of which such personnel worked, place where order was accepted, and whatever other elements a state may consider material. This information must be tabulated with respect to every invoice so that the taxpayer can determine which sales to include in the gross receipts ratio for each state. In like manner, data for every factor used by a state in its apportionment formula must be collected and tabulated. Thus, payroll accounts must be broken down as to type of compensation and as to type of employees compensated. Average property ratios must be calculated with respect to all real and tangible personal property, with respect to intangible property and with respect to inventories. From day to day, records must be kept so that this information will be available at year-end. Accounting procedure for tabulating this data must be adopted.

At the end of the year the corporation must prepare income tax returns in each state in which it carries on selling activities. The information required on each return differs and the legal, auditing and clerical job of preparing and filing the returns, in and of itself, will constitute a tremendous burden.

Filing a return is not, however, the end of the problem. The interstate concern must look forward to periodic audits by representatives of the taxing authorities in each jurisdiction where it pays income taxes. Not only are these visits time-consuming, but the states have now adopted a practice of making the company pay the expenses of the auditor. Unless the concern pays such costs, the state threatens to subpoena all of the company's records and cause the company to produce its records in the office of the tax commissioner.

Finally, there are the costs of resolving controversies and the costs of possible litigation to prevent unreasonable state exactions.

No effort will be made to describe in detail the burden on interstate commerce which would result from the delegation of the income tax power to a substantial number of municipalities or other political subdivisions. As emphasized throughout this discussion, salesmen efficiently representing their company must travel in all the principal cities of this country. If their activities were to require the payment of an infinite number of city income taxes, each calculated by a different formula and on a different basis, the resulting burden would be inconceivable.

The burden of multiple taxation and the burden of complying with the income tax laws of thirty-five or more states and a growing number of municipalities and other political subdivisions can perhaps be borne by the huge industrial concerns of this country without significant economic effect

on their operations. Such giant companies have large legal and auditing departments. They have the latest business machines which can catalogue and produce the required information at the flick of a switch. Already, they are doing business and are taxable in a large number of jurisdictions.

It is the medium and small-sized manufacturing concerns which will be truly burdened if they are required to file returns and pay taxes in thirty-five or more states plus an indeterminate number of cities. As has been previously discussed, such companies have, up to now, limited their taxable activities to one, two or three jurisdictions. Only in rare instances do medium-sized companies maintain factories, warehouses or business offices in more than five states. Nor is any inconvenience caused to these businesses by so limiting their activities. This pattern represents the normal production, warehousing and operating practices adopted by American manufacturing companies.

An effort to concentrate sales activities would be, however, quite another matter. With modern means of transportation and communication, even small companies sell on the national market. Companies making a specialized product soon fill the demand in their immediate region and must tap the national market in order to survive. There is no feasible means of centralizing the activities of one's salesmen. They must contact the customer where he is located. Still, if volume and profits from operations in a particular jurisdiction are small, the burden of complying with state income tax laws will demand a retrenchment. Increased costs will force many of the smaller companies to abandon areas where their sales are small and concentrate on a few states nearer home. Certainly such a result is just what the commerce clause was designed to prevent.

Further, there will be strong pressures on the smaller companies to change their methods of distribution. No doubt, the tendency will be to use independent manufac-

turers' agents, wholesale distributors and other such sales outlets. Again the independence and growth of small business will be injuriously affected. Again, interstate commerce will suffer.

Since the adoption of the United States Constitution, this Court has consistently held that exclusively interstate commerce is exempt from general taxation by the states. As the Court decided at an early date, the Constitution established an area of free trade among the several states. In the one hundred eighty-two years that have elapsed since its adoption, this Court has painstakingly, case by case, hewn out a definition of this commerce. There can be no effective substitute for the definition of interstate commerce so tediously and yet so thoroughly developed by the Court. A new or different approach would be obliged to create great confusion.

One of the leading legal publishers in its State and Local Tax Bulletin of July 22, 1958,[1] pointed up the problem vividly. The Report referred to a recent decision by the North Carolina Supreme Court holding that North Carolina could levy its net income tax on a carrier involved exclusively in interstate commerce.[2] It said (p. 2):

> "FANTASTIC RESULTS—At stake is not only an incalculable future burden on all cross-state activities, but a corresponding one on the Courts themselves. If 5 out of 9 federal high court justices go along with North Carolina, in one stroke all existing landmarks, all known tests of interstate tax immunity will be wiped out completely. There will be no basis, no predictable way to draw the thin though decisive interstate

[1] P-H, STATE & LOCAL TAXES, Report Bulletin No. 3, Par. 3.1, July 22, 1958.

[2] *ET&WNC Transportation Co. v. Currie*, No. 451, decided by the Supreme Court of North Carolina on June 30, 1958 (not yet reported).

line once respected by the federal bench. Every state will have an unassailable tax claim on every penny of net income *derived in any way from sources within its borders.* The progressive multiple effects of future and back assessments are simply inconceivable. To the extent that any individual, association or corporation anywhere in the United States has tapped the markets of any state it will be accountable taxwise to that state. This will call for a veritable flood of returns, assessments, and payments in the wake of every dollar of business drawn from each state. Because of the nonuniformity of allocation and apportionment procedures in the various states, every business man will be subject to a very real burden of accounting for multiple levies, frequently on well over 100% of his income spread among the contacted states. Every 'minimum contact' with a state will be scrutinized. The slightest vestige of property, personnel (even those casually or occasionally employed), and the most fleeting, tenuous or insubstantial act or communication may supply a tax link if part of regular business. The tax target will take in every local advertising lead, directory listing and personal visitation—as well as written, telegraphic, telephonic, electronic, and other mediums of contact, productive of any business or receipts in any way tapping the markets of a state by interstate means. A road to large-scale tax-induced bankruptcy. Fantastic? What is to prevent it?" (Emphasis by the author).

We respectfully submit that the commerce clause of the United States Constitution prevents it.

4. Authorities relied upon by petitioner are not controlling.

Petitioner relies on three lines of authority. First, he cites the dictum appearing in the *U. S. Glue* case[1] and the

[1] *U. S. Glue Co.* v. *Oak Creek*, 247 U. S. 321 (1918).

dicta in later cases which follow it. Secondly, he discusses the cases which hold that the inclusion of wages paid to government employees in their income for tax purposes does not amount to a tax on the government. Thirdly, he relies on *Peck & Co.* v. *Lowe*[1] which holds that federal income taxes collected from exporters do not amount to a prohibited tax on articles of export.

The idea that a net income tax on interstate commerce was not a burden on that commerce apparently found its origin in the *U. S. Glue* case. There the taxpayer was a domestic corporation with its principal manufacturing plant located in Wisconsin. The only question before the Court was whether or not Wisconsin could tax the net income derived from sales which had been negotiated and, in some instances, effected outside the state. The Court held that although the sales in question were a part of interstate commerce, Wisconsin, the domiciliary state, could include them in computing its net income tax. Rather than supporting petitioner's argument, this case would seem to suggest a contrary result. If a taxpayer's home state can tax profits from all its sales, even those negotiated outside the state, one must conclude that the process of negotiating sales is a relatively unimportant part of the company's total activities. Further, negotiating sales is an integral part of interstate commerce. If a state levies a tax solely on this relatively unimportant element of interstate commerce, it necessarily follows that such a tax is a burden on that commerce.

Moreover, in the recent case of *Freeman* v. *Hewitt*, 329 U. S. 249 (1946), this Court recognized that the taxing power permitted by the *U. S. Glue* case was only applicable to residents of a state. It said (p. 255): "It [*a state*] *can tax the privilege of residence in the State and measure the*

[1] 247 U. S. 165 (1918).

privilege by net income, including that derived from interstate commerce.'' Supporting this statement, the Court cited *U. S. Glue.*

The suggestion in *U. S. Glue* that a gross receipts tax is a direct burden on interstate commerce, whereas a net income tax merely reaches the profits from such commerce does not appear tenable when applied to the facts of the instant case. Under the rule announced in *U. S. Glue*, all of respondent's income is taxable in its home state. If Georgia may impose its income tax because of respondent's activities within the state, all of which are a part of interstate commerce, then respondent's profits will be subjected to at least two state net income taxes.

Net income taxation has reached high brackets never dreamed of by the Justices who earlier suggested the distinction between net and gross income taxes. The top federal rate on corporations is now fifty-two (52%) per cent and state rates are climbing steadily with the ever increasing demands for revenue. No longer can a court say that a tax measured by net income is indirect and as such does not burden interstate commerce. The imposition of two or three state net income taxes in addition to federal taxes will, within the foreseeable future, become confiscatory.

Petitioner argues that the distinction between net income taxes and gross income taxes suggested by the *U. S. Glue* dictum was the basis for the Court's decision in *West Publishing Co.* v. *McColgan*, 328 U. S. 823 (1946). Since this Court decided the *West Publishing* case by a *per curiam* order, reference must be made to the lower court opinion for the facts.[1] West Publishing Company resisted the imposition of the California net income tax on the ground that it was engaged exclusively in interstate commerce and, as such, not subject to taxation in California. West

[1] 27 Cal.2d 705, 166 P.2d 861 (1946).

"had four regularly employed solicitors in the state who devoted their entire time to plaintiff's business." These employees were authorized to receive payments on orders taken by them, to collect delinquent accounts, and to make adjustments in case of complaints by customers. These employees had space in lawyers' offices and maintained a store of books in such offices.

It is apparent from this brief statement of facts that West Publishing Company was engaged in many activities which were purely local in nature. The maintenance of a stock of goods in lawyers' offices, the receipt of payments and the collection of delinquent accounts might be treated as local incidents. None of those elements are present in the instant case.

In its *per curiam* opinion, this Court cited four cases but none of them are controlling here. Of the cases cited, we have just discussed *U. S. Glue Co.* v. *Oak Creek* and found that it was not controlling. *Interstate Busses Corp.* v. *Blodgett,* 276 U. S. 245 (1928), holds that a state may impose a tax for the use of its highways in addition to a tax on the sale of gasoline, even where taxpayer is involved exclusively in interstate commerce. *Memphis Natural Gas Co.* v. *Beeler,* 315 U. S. 649, 656 (1942), contains, at the page cited by this Court, a statement which could be construed to permit a net income tax on interstate commerce, but cites no authority for it. The Court had just held that taxpayer was engaged in local activities, and, therefore, the statement is wholly unnecessary to the decision. This Court subsequently indicated its disapproval of this *Memphis Natural Gas* dictum in *Spector Motor Service* v. *O'Connor,* 340 U. S. 602 (1951). After noting that the tax imposed on Memphis Natural Gas Company was supported by intrastate activities, the Court said in *Spector* (p. 609, footnote):

> "The decision in *Memphis Gas Co.* v. *Beeler,* 315 U. S. 649, upheld a Tennessee tax on earnings of the

taxpayer within that State where the earnings were derived from the intrastate distribution of gas by the taxpayer in a joint enterprise with the Memphis Power & Light Company. Any suggestion in that opinion as to the possible validity of such a tax if applied to earnings derived wholly from interstate commerce is not essential to the decision in the case."

Finally, *International Shoe Co.* v. *Washington*, 326 U. S. 310 (1945), deals exclusively with the question of due process since a federal statute had expressly exempted unemployment compensation taxes from the operation of the Commerce Clause.

Apparently the local activities carried on by West Publishing Company were sufficient to uphold the net income tax there involved. Respondent is involved in no local activities whatsoever and the instant case is clearly distinguishable on its facts.

The *U. S. Glue Co.* dictum has been repeated in a number of other cases. In each such case, however, the taxpayer was engaged in substantial local activities. Thus, *Atlantic Coast Line R.R.* v. *Daughton*, 262 U. S. 413 (1923), raised the question of whether or not the portion of a railroad's income allocable to North Carolina for purposes of its net income tax was reasonable. There was no question but what the railroad was carrying on substantial intrastate business within the state and nothing was at issue but the manner in which taxable income was computed.

In *Shaffer* v. *Carter*, 252 U. S. 37 (1920), the non-resident taxpayer operated oil wells within the taxing jurisdiction. Obviously, the operation of an oil well is a local activity.

The dictum in *New York* ex rel. *Cohn* v. *Graves*, 300 U. S. 308 (1937), must be read in light of the fact that the only issue before the Court was whether or not the taxation of

rents from real estate located outside New York violated the due process clause.

Wisconsin v. *Minnesota Mining and Mfg. Co.*, 311 U. S. 452 (1940), did not involve an income tax but was concerned with the Wisconsin privilege dividend tax. Also, taxpayer was engaged in many local activities.

Underwood Typewriter Co. v. *Chamberlain*, 254 U. S. 113, 120 (1920), contains a similar dictum. There the taxpayer manufactured nearly all of its products in Connecticut. Connecticut's net income tax was imposed on that proportion of taxpayer's net income which the value of its real estate and tangible property in Connecticut bore to the total value of all its real estate and tangible property. The Court found that plaintiff had failed to demonstrate that the apportionment formula as applied to it was unreasonable and, therefore, upheld the tax. Nothing contained in that opinion can be construed to authorize a tax on a company engaged solely in interstate commerce.

This Court very carefully explained and limited the *Underwood* decision in *Alpha Portland Cement Co.* v. *Massachusetts*, 268 U. S. 203 (1925). The Court said (p. 218):

> "*The local business of a foreign corporation may support an excise measured in any reasonable way*, if neither interstate commerce nor property beyond the state is taxed. *Underwood Typewriter Co.* v. *Chamberlain*, 254 U. S. 113, 65 L.ed. 165, 41 Sup. Ct. Rep. 45, *approved such an excise measured by income reasonably attributed to intrastate business*; but nothing there said was intended to modify well-established principles."

As a second line of authority petitioner cites the cases which hold that the inclusion of wages or other amounts paid to government employees in their income for tax purposes does not amount to a tax on the government.

Thus, the Court held in *Metcalf & Eddy* v. *Mitchell*, 269 U. S. 514 (1926), that amounts paid to construction engineers by governmental subdivisions must be included in computing their taxable income. At that time, *Collector* v. *Day*[1] still stood for the principle that salaries paid to governmental employees could not be included in their taxable income. The *Metcalf & Eddy* case drew a distinction between salaries paid to employees and fees paid to independent contractors. In 1938, *Graves* v. *New York* ex rel. *O'Keefe*[2] overruled *Collector* v. *Day* and held that government employees must pay income taxes on their salaries.

While this is an interesting line of cases, it has no particular bearing on the issues now before the Court. We readily concede that the State of Georgia may impose its income tax on the salary paid to a salesman who resides in Georgia. Although a tax on a salesman's salary no doubt requires his employer to pay a higher salary and thereby indirectly affects commerce, such a tax is not a prohibited burden. Of course, there is nothing in this line of cases to suggest, nor do we understand petitioner to contend, that the federal government may tax the net income of the states or their political subdivisions. In the analogy which petitioner attempts to draw, interstate commerce stands in the same position as the political subdivision. Both have employees. Salaries paid to employees, whether by political subdivisions or by interstate commerce, are includible in the employees' gross income for tax purposes. There is, however, no suggestion that the income of the employer can be taxed. We submit that this line of authority is not pertinent to the issue at hand.

Finally, petitioner points to *Peck & Co.* v. *Lowe*, 247 U. S. 165 (1918), which holds that exporters must pay federal

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[1] 11 Wall. 113 (1871).

[2] 306 U. S. 466 (1939).

income taxes. This case turns on the constitutional provision which provides:

> "No tax or duty shall be laid on articles exported from any State."[1]

While some of the Court's language tends to support petitioner's contentions, there is an obvious distinction between the two cases. With respect to the validity of a tax on exports, the Court said (p. 173):

> ". . . the true test of its validity is whether it 'so directly and closely' bears on the 'process of exporting' as to be in substance *a tax on the exportation.*"

Petitioner argues that the same rule controls the instant case. He argues that *Peck & Co.* v. *Lowe* stands for the proposition that a tax on net income is not a tax on the source of that income. His brief continues (p. 21): "This proposition cannot be ignored; it refutes absolutely the contention that a tax on net income from interstate commerce *is a tax on interstate commerce.* . . . We think it controls this case."

The foregoing quotation from petitioner's brief points up the reason why the salary cases and the export case are not applicable here. Within the federal system, the states and their subdivisions are exempt from any and all taxation by the federal government. By express constitutional provision, "articles of export" are likewise exempt from taxation. The constitutional provision dealing with interstate commerce does not by its terms, however, prohibit taxation; rather it gives to Congress the power to regulate that commerce. As construed by this Court, the commerce clause prevents the states from placing *burdens on commerce.* The issue is not whether or not a tax is laid on the

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[1]U. S. CONST. art. I, § 9, cl.5.

commerce, but rather whether or not the tax is a burden on commerce. If a corporation engages in intrastate activities within a state, the state may tax the privilege of carrying on the intrastate activity and 'within reasonable limits,' may compute the amount of the charge by applying the tax rate to a fair proportion of the taxpayer's business done within the state, including both interstate and intrastate.'"[1] Under this rule, income taxes which include proceeds from interstate sales have been found not to burden commerce.[2] But this Court has never approved an income tax on exclusively interstate commerce.

Even if a corporation engages in no intrastate activities, it is not entirely beyond the taxing power of the state. This Court has singled out elusive elements of interstate commerce known as local incidents and has permitted their taxation. Although this concept is highly theoretical, it is founded on practical considerations. Taxable incidents have consistently been limited by this Court to events which are truly localized and which can occur in only one place. The ownership of tangible property[3] and the sale[4] of goods are examples of taxable local incidents. Through this approach, interstate commerce is required to pay its way while chances of multiple taxation and discrimination against interstate commerce are minimized.

Petitioner would now have the Court superimpose a fiction on this ethereal structure. He argues, in effect, that the use of an apportionment formula will localize a portion of the net income of interstate commerce and transform it into a local incident where none existed before. As previously noted, the courts permit great latitude in the appor-

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[1] *Spector Motor Service* v. *O'Connor*, 340 U. S. 602, 610 (1951).
[2] *Underwood Typewriter Co.* v. *Chamberlain*, 254 U. S. 113 (1920).
[3] *E.g.*, *Virginia* v. *Imperial Coal Co.*, 293 U. S. 15 (1934).
[4] *General Trading Co.* v. *State Tax Comm'n.*, 322 U. S. 335 (1944).

tionment formulae which may be used by the states. The concept of a local incident by itself creates some danger of double taxation and discrimination against interstate commerce. The addition of a fiction would compound the danger by geometric proportions.

In determining whether or not a net income tax will burden corporations whose only activities within the state consist of soliciting sales, the Court must bear in mind the practical difficulty which a corporation has in limiting the activities of its salesmen. While a corporation can and ordinarily does limit the number of states in which it has manufacturing plants, warehouses or offices at which the corporation's business is transacted, it can hardly limit the location of its customers. If a corporation is to develop its maximum market, it must go to and contact customers in every taxing jurisdiction. A requirement that a corporation pay general income taxes in every state where its customers are located would amount to a tremendous burden.

Petitioner apparently concedes that the lack of uniformity among the states can, as a practical matter, result in double taxation and that the burden of compliance will at least be an incidental burden. He suggests, however, that interstate commerce look to Congress for protection. As the Court has so frequently held, however, the Commerce Clause of the United States Constitution in and of itself creates an area of free trade among the several states.[1] Historically, corporations have been permitted to tap the national market without being subjected to tariff barriers or other burdens.

It is, of course, true that Congress may by law "redefine

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[1] *E.g., Freeman v. Hewit*, 329 U. S. 249, 252 (1946).

the distribution of power over interstate commerce."[1] Should Congress see fit to permit the states to tax the net income of corporations engaged exclusively in interstate commerce, it can do so. As a condition to such permission, the Congress could be expected to prescribe reasonable safeguards for interstate commerce. No doubt, the Congress would establish a standard allocation formula which would not only avoid the danger of multiple taxation, but would also avoid the excessive costs of compliance and the administration difficulties which would be caused by thirty-five different state taxes. Until such time as Congress acts, however, we submit that the Constitution protects interstate commerce from so substantial a burden.

In conclusion, we should remember that the basic problem of state taxation of interstate selling was first presented to this Court many years ago. In 1887 the rule covering traveling salesmen was established. *Robbins* v. *Shelby Taxing District*, 120 U. S. 489 (1887). The cogent reasoning of the Court's opinion is equally valid today (p. 498):

> "If the selling of goods by sample and the employment of drummers for that purpose, injuriously affect the local interest of the states, Congress, if applied to, will undoubtedly make such reasonable regulations as the case may demand. And Congress alone can do it; for it is obvious that such regulations should be based on a uniform system applicable to the whole country, and not left to the varied, discordant, or retaliatory enactments of forty different states. The confusion into which the commerce of the country would be

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[1] *Southern Pacific Co.* v. *Arizona*, 325 U. S. 761, 769 (1945). Congress has often returned certain phases of control over commerce to the states. *E.g.*, *International Shoe Co.* v. *Washington*, 326 U. S. 310 (1945) (unemployment compensation taxes); and *Prudential Insurance Co.* v. *Benjamin*, 328 U. S. 408 (1946) (insurance).

thrown by being subject to state legislation on this subject, would be but a repetition of the disorder which prevailed under the Articles of Confederation."

If a state may impose a net income tax on activities of a foreign corporation engaged exclusively in interstate commerce, then the confusion, the administrative difficulty and the actual monetary burden on small businesses will absolutely prevent their doing a multi-state business. The burden on larger, better established corporations will surely discourage their entry into many states. This is exactly what the commerce clause seeks to prevent and it is confidently urged that the commerce clause does prevent such a result. We respectfully submit that the Georgia income tax, as applied to Stockham Valves & Fittings, Inc., imposes a direct burden on interstate commerce and is, therefore, unconstitutional.

II

DUE PROCESS CLAUSE

I. The fact that respondent maintains one sales service office in Georgia and one of its sales representatives spends one-third of his time in Georgia does not make respondent present in the State in any substantial sense and an attempt to subject it to an income tax violates the Due Process Clause of the Federal Constitution.

At the risk of repetition, it may be helpful once again to point out the very slight connection which respondent had with the State of Georgia. Respondent's only contact with Georgia was through its sales service office in Atlanta, and its sales representative. All of respondent's sales were made on a "f.o.b.-warehouse" basis and were completed outside Georgia by deliveries to customers or to common carriers consigned to customers. All orders were accepted or rejected in Alabama.

It is beyond dispute that a state may not tax activities carried on outside its borders without violating the due process clause of the Federal Constitution. The only question is whether or not respondent's activities created such a connection with the State of Georgia as to permit the imposition of a general income tax on a portion of respondent's net income. The criterion by which to determine whether or not such a connection exists between a business and the taxing state was well stated by this Court in *Wisconsin* v. *J. C. Penney Co.*, 311 U. S. 435 (1940), where the Court said (p. 444):

> "That test is whether property was taken without due process of law, or, if paraphrase we must, *whether the taxing power exerted by the state bears fiscal relation to protection, opportunities and benefits given by the state.* The simple but controlling question is whether the state has given anything for which it can ask return."

In the first section of this brief dealing with the commerce clause considerable emphasis was placed on the *Spector* case[1] and the *Railway Express Agency* case.[2] Both of these recent cases involved taxes on interstate transportation. In neither of these cases was due process an issue since the taxpayers were engaged in substantial local activities.

Miller Brothers Co. v. *Maryland*, 347 U. S. 340 (1954), decided by this Court in the 1953 term, is the most recent due process case involving facts which are similar to those in the instant case. There Maryland sought to collect its use tax from a Delaware merchandising corporation which owned a store in Wilmington, Delaware. Many residents of nearby Maryland came to the store and made purchases, some of which they took away with them, some of which

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[1] *Spector Motor Service* v. *O'Connor*, 340 U. S. 602 (1951).
[2] *Railway Express Agency, Inc.* v. *Virginia*, 347 U. S. 359 (1954).

were delivered to them in Maryland by common carrier, and others were delivered to them by the store's own trucks. In addition, the store's radio advertising in Wilmington was picked up by Maryland buyers, as was advertising in Wilmington papers, and the store's direct mail advertising was received by them. The similarity between those facts and the facts here under consideration is apparent. Miller Brothers' advertising had a direct effect on Maryland citizens. In both cases the actual sales were effected outside the taxing state. In the instant case, respondent had a sales representative who worked in Georgia. There, Miller Brothers made actual deliveries to Maryland customers in its own trucks. Miller Brothers resisted the payment of a use tax which was passed on to its customers, whereas respondent here resists a more direct burden, in that it must bear the economic effects of the net income tax which Georgia seeks to impose. One cannot say, therefore, that Georgia has any greater justification for imposing an income tax than Maryland had for imposing a use tax.

This Court held that it amounted to a denial of due process of law for Maryland to impose such a tax on Miller Brothers. The Court faced the issue squarely. It said (p. 344):

> "The question here is whether this vendor, [Miller Brothers] by its acts or course of dealing, has subjected itself to the taxing power of Maryland or whether it has afforded that State a jurisdiction or power to create this collector's liability."

The Court referred to its previous decisions, saying (p. 344):

> "Our decisions are not always clear as to the grounds on which a tax is supported, especially where more than one exists; nor are all of our pronouncements during the experimental period of this type of taxation consistent or reconcilable. A few have been specifically

overruled, while others no longer fully represent the present state of the law. But the course of decisions does reflect at least consistent adherence to one time-honored concept: *that due process requires some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax.*"

The State of Maryland, as does petitioner, relied on *General Trading Co.* v. *State Tax Comm'n*, 322 U. S. 335 (1944). Speaking for the majority of the Court in *Miller Brothers*, Justice Jackson narrowly limited the application of that case to its own facts. He noted that he had dissented in *General Trading Co.*, but still pointed out that it was clearly distinguishable. He stated that the out-of-state merchant there conducted "*continuous local solicitation* followed by delivery of ordered goods to the customers, the only non-local phase of the total sale being acceptance of the order. Probably, except for credit reasons, acceptance was a mere formality, since one hardly incurs the cost of soliciting orders to reject. The Court could properly approve the State's decision to regard *such a rivalry with its local merchants as equivalent to being a local merchant.*"[1] Such are not the facts here. The majority of respondent's orders from Georgia were received by direct mail or other methods of communication from the customers and bore no direct relation to solicitation by respondent's representative. Respondent had one representative who spent only one-third of his time in Georgia. Orders were rejected for credit and other reasons. (R. 4). The facts here fall under the rule announced in *Miller Brothers* and clearly require a holding that the Georgia income tax is unconstitutional as applied to respondent because it amounts to a denial of due process of law.

The soundness of this conclusion is borne out by reference to *Norton Co.* v. *Dept. of Revenue*, 340 U. S. 534 (1951).

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[1] *Miller Brothers Co.* v. *Maryland*, 347 U. S. 340, 346 (1954).

Although the Court was discussing the commerce clause, its observations are nonetheless pertinent here. It said (p. 537):

> "Where a corporation chooses to stay at home in all respects except to send abroad advertising or drummers to solicit orders which are sent directly to the home office for acceptance, filling, and delivery back to the buyer, it is obvious that the State of the buyer has no local grip on the seller. Unless some local incident occurs sufficient to bring the transaction within its taxing power, the vendor is not taxable."

That it is illegal to tax an interstate business merely because it solicits orders or operates a sales office in the taxing state is demonstrated by the converse situation. Manufacturing concerns have often argued that their home state cannot tax their entire net profits, because part of those profits are properly attributable to the states in which their sales activities and customers were located. Uniformly, this Court has rejected this contention. *E.g.*, *Hump Hairpin Mfg. Co.* v. *Emmerson*, 258 U. S. 290 (1922); *U. S. Glue Co.* v. *Oak Creek*, 247 U. S. 321 (1918).

In assessing the degree in which respondent's transactions connect it with Georgia, the decision of this Court in *Compania General* v. *Collector*, 279 U. S. 306 (1929), may be helpful, even though the question before the Court was somewhat different. There the taxpayer manufactured goods in the Philippine Islands and sold them in the United States. The Court was asked to construe a statute which laid a net income tax on income "received from sources within the Philippine Islands." The Court found that all orders solicited in the United States were subject to taxpayer's acceptance at its home office in the Philippines. The Court then said (p. 309):

> "If, in fact, the sales were thus made in the Philippine Islands, we think it unimportant whether the mer-

chandise sold was exported before or after its sale; *it could not be seriously contended*, and indeed petitioner does not contend, *that a profit derived from such transactions would not be subject to the tax. For, in such a case, the entire transaction resulting in a profit, with the exception of the negotiations in the United States preceding the sale, would have taken place in the Philippines.*"

In the *Compania General* case, this Court holds that "it could not be seriously contended" that the negotiation and solicitation of orders outside the Philippine Islands followed by shipment of goods to the purchaser would prevent the income from such sales being "received from sources within" the Philippine Islands. Conversely, it cannot be contended that, based solely on its sales activity in Georgia, respondent may be taxed without denying it due process of law.

The Court of Appeals for the Fifth Circuit reached the identical conclusion in a tax case arising under a similar law. *Commissioner* v. *East Coast Oil Co., S. A.*, 85 F.2d 322, *cert. denied*, 299 U. S. 608 (1936). There taxpayer was a Mexican oil company which maintained sales agencies in the United States. Its salesmen negotiated contracts for the sale of oil and actually collected the purchase price thereof. Title to the oil, however, passed to the buyer in Mexico. The question was whether or not any income had been "derived from sources within the United States." The court stated (p. 323):

> "In this case the important question is when and where were the profits earned. The company is a Mexican corporation, necessarily domiciled in that country. The property sold was produced in Mexico. The contracts provided for firm sales. No profit resulted from the mere execution of the contracts. The oil was delivered to the buyer in Mexico. The title passed to the buyer in Mexico. When title passed the profit was

earned in Mexico. Collection of the price in the United States was incidental and did not earn the profit.

"We agree with the conclusion of the board that the taxes were unlawfully assessed on income derived from sources without the United States."

If it cannot be said that any income is derived from selling activities, it is difficult to see how such activities will permit the imposition of a net income tax without denying due process of law.

2. Activities within a state, sufficient to satisfy due process for one purpose, may not satisfy due process for a different purpose.

We agree with petitioner that a corporation being an artificial creature, its presence within a state can only be manifested "by activities carried on in its behalf by those who are authorized to act for it."[1] Under the due process clause, those activities must be of a certain quality and a certain quantity before the corporation is subject to the jurisdiction of a state. Petitioner argues that the quality and the quantity of activities necessary to satisfy the due process clause are the same for all purposes. He indiscriminately discusses cases dealing with the activities of a corporation required to justify service of process, unemployment compensation taxes, sales taxes, use taxes and income taxes.

Thus, petitioner emphasizes *International Harvester Co. v. Kentucky*, 234 U. S. 579 (1914). There, salesmen representing International Harvester solicited business in Kentucky. That case is different from the instant case because the International Harvester salesmen had authority to and did in fact receive payment for the goods which they sold. The real fallacy in petitioner's argument, however, is that

[1] *International Shoe Co. v. Washington*, 326 U. S. 310, 316 (1945).

the only issue in the *International Harvester* case was whether or not process could be served on the company in Kentucky.

This Court's decision at the last term in *McGee* v. *International Life Ins. Co.*, 355 U. S. 220 (1957), illustrates the distinctions which must be drawn between various due process cases. International Insurance Company was incorporated in Texas. In 1948 it entered into an agreement with Empire Mutual Insurance Company to assume all of that company's outstanding policies. At that time it mailed a re-insurance certificate to the plaintiff who was a California resident. Thereafter, the plaintiff mailed his premiums to the defendant's home office in Texas. The beneficiary, a California resident, brought suit for payment of the policy in California. The defendant had no other connection with the state. In reaching a decision that the insurance company was subject to suit in California, the Court said (p. 201):

> "It is sufficient for purposes of due process that the suit was based on a contract which had substantial connection with that State. (Citations omitted). The contract was delivered in California, the premiums were mailed from there and the insured was a resident of that State when he died."

Although International Life Insurance Company carried on sufficient activities within the State of California to subject it to suit on a policy insuring the life of a California citizen, no one would seriously contend that those slight activities would subject it to California's general net income tax. Surely, it would be a denial of due process to require an insurance company to file annual income tax returns and pay a state income tax solely because it wrote a policy of insurance on the life of one of the state's citizens.

A case in which the facts were quite similar to the *McGee* case fortifies the conclusion that activities may satisfy due

process for one purpose but not for another. In *Connecticut General Life Ins. Co.* v. *Johnson*, 303 U. S. 77 (1938), California imposed a tax on all life insurance premiums collected by foreign insurance companies from California citizens and, in addition, on premiums received under re-insurance agreements with other insurance companies covering California lives. Connecticut General urged that these re-insurance agreements were entered into outside of California, that premiums and losses were paid outside of California, and that the mere fact that the policies re-insured lives of California citizens did not give the state jurisdiction to impose a tax on the collection of such premiums. This Court held that even though the policies of re-insurance were on California lives, taxation of the re-insurance premiums would amount to a denial of due process of law.

Under the principle announced in the *McGee* case, a California citizen could presumably bring suit in California on a re-insurance agreement covering his life without violating the due process clause. For the purpose of taxation, however, the same activities are insufficient. That activities which satisfied due process for one purpose may not satisfy due process for another purpose is evident. The *McGee* case, which was very similar on its facts to the *Connecticut General* case, reached an opposite conclusion without even citing the *Connecticut General* case. Evidently the Court did not consider a case dealing with taxation to be pertinent to an inquiry into the constitutional validity of the service of process.

Not only do activities which satisfy due process for purposes of taxation differ from the activities required for service of process, but the activities necessary to uphold one type of tax may differ from those required to uphold another type. In *International Shoe Co.* v. *Washington*, 326 U. S. 310 (1945), the Court upheld the Washington unemployment compensation tax on salaries paid to tax-

payer's salesmen. These salesmen were residents of Washington, apparently spent their entire time within the state and, in some instances, maintained permanent showrooms in the state. The unemployment compensation tax was based on the salaries paid to the salesmen. Had the salesmen become unemployed, they would have been a charge on the State of Washington. The tax was on the precise activities which the corporation carried on within the state.[1] It should also be noted that taxpayer's activities within the state were considerably more numerous than those of respondent.

Another type of tax which may be imposed on foreign corporations even though they have minimum contacts with the taxing state is the sales tax.[2] Again, the tax is laid directly on a transaction which occurs within the state—the sale of merchandise.

The degree of activity by a foreign corporation necessary to satisfy due process must, therefore, be determined in light of the obligation that the state is attempting to impose on the corporation. Very little activity is required if the question is whether or not suit may be brought on a contract which bears direct relation to the state. Not a great deal of activity is required if the state attempts to tax a transaction which occurs within its borders. Taxes on salesmen's salaries and taxes on sales illustrate the latter point. If a state, however, endeavors to treat a foreign corporation in the same manner as a domestic corporation and to impose a general net income tax or other general obligation on the corporation, traditional notions of fair play require more substantial connections. Activities by a sales repre-

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[1]The Commerce Clause was not involved in the *International Shoe* case as Congress had passed a statute permitting the imposition of such a tax on commerce.

[2]*E.g., General Trading Co.* v. *State Tax Comm'n.*, 322 U. S. 335 (1944).

ntative who has no authority to act for the corporation, cept in soliciting orders, is not a substantial connection. aditionally, the activities of a sales organization have en held not even to constitute doing business. See, *E.g.*, *edwine* v. *Don River Mills, Inc.*, 207 Ga. 381, 61 S. E. 2d 1 (1950). Those activities do not justify the imposition a general income tax measured by a portion of the com-ny's over-all profit which is related only indirectly, if all, to the activities carried on within the state.

By denying the states the right to collect net income taxes om interstate concerns whose activities within the juris-ction are limited to sales solicitation, interstate commerce es not obtain a free ride. Property taxes, sales taxes, employment compensation taxes and other taxes on local tivities of a foreign corporation may be collected by the ates. Through its sales and use tax, a state is fully com-nsated for providing a market in which a foreign corpo-tion may sell its goods.[1] By taxing the corporation's ngible property, a state is compensated for the protection forded that property. Through its gasoline taxes, a state compensated for use of its highways. Through its taxes employees' incomes, a state is compensated for the serv-es which it provides for such persons. Through unem-oyment compensation taxes, a state defrays a portion of e cost of its welfare program. It is evident, therefore, at a limitation on a state's power to impose its general t income tax does not give foreign corporations a free le, nor does it seriously affect the revenue sources of e states.

Respondent has no such connection with the State of orgia as will permit the imposition of a net income tax thout denying it due process of law.

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[1] In addition to an income tax, Georgia also imposes a sales and e tax.

CONCLUSION

It is respectfully submitted that, as applied to respondent, the Georgia income tax violates both the commerce clause and the due process clause of the United States Constitution, and that the decision of the Supreme Court of Georgia should therefore be affirmed.

Respectfully submitted,

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APPENDIX

P-H CHART OF ALLOCATION AND APPORTIONMENT FACTORS*

State (A)	Factors Used In Apportionment Fractions: Property (B)	Receipts (C)	Payroll (D)	Others (E)	Items separately Allocated (F)	Separate accounting allowed? (G)
ALA.[1]	Yes	Yes	No	14		Yes
ALASKA	Yes	No	Yes		1-5	Yes
ARIZ.	Yes	Yes	Yes		1-5	Yes
ARK.	No	Yes	No	1,14	1-6	Yes
CALIF.	Yes	Yes	Yes	2	2-5,7	Yes
COLO.	Yes	Yes	No		1-5	Yes
CONN.	Yes	Yes	Yes	21	1,3-5,7,20	Yes
DEL.	Yes	Yes	Yes		2,3,5;15,16,20	Yes
D.C.	No	Yes	No		2-5,7,9,14,20	Yes
GA.	Yes	Yes	Yes	4-6	2-5,7	Yes
HAW.	Yes	Yes	Yes			Yes
IDA.	Yes	Yes	Yes		2,3,5,6,16	Yes
IOWA	No	Yes	No	3	2-5,8	Yes
IND.[2]	No	No	No			
KAN.	Yes	Yes	No	4,5,14	1-5	Yes
KY.	Yes	Yes	Yes	5	13	Yes
LA.	Yes	Yes	Yes	16	1-6	Yes
MD.	Yes	Yes	Yes		2,3	Yes
MASS.	Yes	Yes	Yes		1,4,5	No
MINN.	Yes	Yes	Yes	20	1-5	Yes
MISS.	Yes	Yes	Yes[1]	4,5	2-5,10-12	Yes
MO.	No	Yes	No		1-5	Yes
MONT.	Yes	Yes	Yes	7,19	1-5	Yes
N. MEX.	Yes	Yes	No	13	2,4,13	Yes
N. Y.	Yes	Yes	Yes	8	1-5,9	Yes
N. C.	Yes	Yes	Yes	4-6,9	1-5,7,16,17	Yes
N. D.	Yes	Yes	Yes	10	1-5,7	Yes
OKLA.	Yes	Yes	No	5,15	1-5	No
ORE.	Yes	Yes	Yes	18	1-5,17	Yes
[illegible]	[illegible]	[illegible]	[illegible]	11	1-5	[illegible]

DEL.	Yes	Yes	Yes			Yes
D.C.	No	Yes	No		2-5,7,9,14,20	Yes
GA.	Yes	Yes	Yes	4-6	2-5,7	Yes
HAW.	Yes	Yes	Yes			Yes
IDA.	Yes	Yes	Yes		2,3,5,6,16	Yes
IOWA	No	Yes	No	3	2-5,8	Yes
IND.[2]	No	No	No			
KAN.	Yes	Yes	No	4,5,14	1-5	Yes
KY.	Yes	Yes	Yes	5	13	Yes
LA.	Yes	Yes	Yes	16	1-6	Yes
MD.	Yes	Yes	Yes		2,3	Yes
MASS.	Yes	Yes	Yes		1,4,5	No
MINN.	Yes	Yes	Yes	20	1-5	Yes
MISS.	Yes	Yes	Yes[1]	4,5	2-5,10-12	Yes
MO.	No	Yes	No		1-5	Yes
MONT.	Yes	Yes	Yes	7,19	1-5	Yes
N. MEX.	Yes	Yes	No	13	2,4,13	Yes
N. Y.	Yes	Yes	Yes	8	1-5,9	Yes
N. C.	Yes	Yes	Yes	4-6,9	1-5,7,16,17	Yes
N. D.	Yes	Yes	Yes	10	1-5,7	Yes
OKLA.	Yes	Yes	No	5,15	1-5	No
ORE.	Yes	Yes	Yes	18	1-5,17	Yes
PA.	Yes	Yes	Yes	11	1-5	No
R. I.	Yes	Yes	Yes			No
S. C.[1]	Yes	Yes	No	12,14	16	Yes
TENN.	Yes	Yes	No	17	19	Yes
UTAH	Yes	Yes	Yes		2-5,15	Yes
VT.	Yes	Yes	Yes			No
VA.	Yes	Yes	No			Yes
WIS.	Yes	Yes	No	14	1-6,14	Yes

[Footnotes to chart.] (Dashes signify inclusive numbers.)

Col. A.—(1) Domestic corporation can't allocate. (2) Gross income tax, no allocation.

Col. D.—(1) Manufacturing labor only, direct and indirect.

Col. E.—(1) For manufacturing sales corporations, marketing cost if no production in state. (2) Mileage for refrigerator cars. (3) For business other than manufacture or sale of tangible personalty, tax commission may make rules, including rules covering property, receipts and payroll. (4) Special provision for railroads. (5) Special provision for public utility companies. (6) Special provision for other specialized businesses.

(7) Such other factors as taxpayer deems applicable. (8) 3-factor formula for business income and capital; investment income and capital separately treated. (9) For manufacturing, assembling, etc., corporations. (10) Cost of goods consumed or sold. (11) Separate provision for construction, insurance and surety companies. (12) For manufacturing business. (13) Operating expenses. (14) Manufacturing cost. (15) Cost of operation. (16) Special provisions for air transportation companies, pipe lines, other transportation companies, service enterprises and loan businesses. (17) Special provisions for carriers, sellers, insurance companies, manufacturers, construction companies, and businesses not enumerated. (18) Special provision for air, water and motor carriers, railroads and financial businesses. (19) Special provision for interstate carriers. (20) Special provision for insurance and investment companies. (21) Special provision for commercial aviation, telephone and bus companies.

Col. F.—(1) Capital gains. (2) Rents. (3) Royalties (except from patents in Utah). (4) Dividends. (5) Interest. (6) Income from services or labor performed in state. (7) Gain on sale of assets not connected with the business. (8) Income from personal services. (9) Income from sale of realty. (10) Income from property produced and sold in different places. (11) Insurance premiums. (12) Income from ownership or operation of property. (13) Sales, bonuses or other income directly allocable to state. (14) Income from construction repairs and similar services. (15) Tangible capital assets. (16) Gain or loss on sale of realty. (17) Gain from sale of tangible assets not connected with business. (18) Non-business income. (19) Income from constructing or improving real property. (20) Gain or loss from sale of intangibles.

*P-H, State & Local Taxes, All States Report Bulletin No. 34, par. 34.1, March 4, 1958.

P-H CHART OF FACTORS CONTROLLING RECEIPTS ALLOCATION*

State	Location of: Office where negotiated (A)	Property at time of order (B)	Receipt or acceptance of order (C)	Negotiating personnel (D)	Delivery place (E)	Shipment origin (F)	Other (G)
Ala.	X[1, 2]	X[1]					
Alaska							X[1]
Ariz.				X[1]			
Ark.							X[2]
Calif.				X[1]			
Colo.					X		
Conn.			X[1]				
D.C.	X[6, 7]			X[2]			
Del.					X		
Ga.					X[6]		
Hawaii	X[5]		X[2]		X[3]		
Idaho			X[3]				
Ind.							X[3]
Iowa			X		X[6]		
Kans.	X[2, 6]						
Ky.	X[7]						
La.					X		
Md.	X[2, 9]						
Mass.	X[7, 10]						
Minn.	X[10]						X[4]
Miss.	X[11]				X[7]	X[3]	
Mo.	X		X[6]		X	X	X[5]
Mont.	X[12]	X[2]	X[6]		X[6]	X[2]	
N. M.							X[2]
N. Y.		X[2]	X[4]				
N. C.					X[1]		
N. D.	X[7]				X	X	
Okla.	X[13]		X[5]		X[4]		
Ore.		X[4]		X[1]	X[3]		
Pa.	X[8, 10]			X[3]			
R. I.	X						
S. C.	X[4]		X[7]				
Tenn.	X[2, 6]			X[4]	X[5]		
Utah	X[10]	X[3]	X[6]	X[5]	X[6]	X[2]	
Vt.		X[2]	X[4]				

Ky.	X[7]						
La.					X		
Md.	X[3, 9]						
Mass.	X[7, 10]						
Minn.	X[10]						X[4]
Miss.	X[11]				X[7]	X[3]	
Mo.	X		X[6]		X	X	X[5]
Mont.	X[12]	X[3]	X[6]		X[6]	X[2]	
N. M.							X[3]
N. Y.		X[3]	X[4]				
N. C.					X[1]		
N. D.	X[7]				X	X	
Okla.	X[13]		X[5]		X[4]		
Ore.		X[4]		X[1]	X[3]		
Pa.	X[8, 10]			X[3]			
R. I.	X						
S. C.	X[4]		X[7]				
Tenn.	X[2, 6]			X[4]	X[5]		
Utah	X[10]	X[3]	X[6]	X[5]	X[6]	X[2]	
Vt.		X[2]	X[4]				
Va.	X					X	X[6]
Wisc.	X[2]		X				

Col. A.—(1) Conflict; form instructions use Col. A, regulations Col. B. (2) Sales through or by offices, agencies or branches in the state. (3) Sales to District customers fairly attributable to District activity, including solicitation. (4) Numerator sales include those principally secured, negotiated or effected by employees, agents, consignees, offices or branches resident or located in the state. (5) See Col. C. (6) Public or private warehouse treated like office, (7) Office, agency or place of business, where transaction chiefly negotiated. (8) Privilege income tax only. (9) Also sales solicited, outstate if not through established agents, offices or branches maintained outstate. (10) All sales not negotiated or effected by agents or agencies chiefly at, connected with or sent out from business premises outstate. (11) Sales assignable to office, agency or place of business where binding sale or agreement first occurs. (12) Statute authorizes administrative rules; Mass. formula generally acceptable. (13) Includes sales between outstate points if order secured or received by Okla. office or salesman working from it.

Col. B.—(1) Location of property at time of receipt of or appropriation to order. (2) Numerator includes receipts from property in state on receipt or appropriation to order, or not located at permanent outstate business place of taxpayer when order received or accepted in state. (3) One element of local sale. (4) If no sales activity needed.

Col. C.—(1) Place finally passing upon the consummation. (2) Includes sales accepted by office or representative in Hawaii and delivered to outside purchaser if taxpayer not doing business at delivery point. (3) Office, warehouse, etc., where orders received and accepted. (4) See Col. B. (5) See Col. A, ft. (13). (6) One element of local sale. (7) By 1958 amendment for new industries; others after 1-1-60.

Col. D.—(1) Place where selling services are performed. (2) See Col. A, ft. (3). (3) For direct (property) income tax only. (4) See Col. A, ft. (4). (5) Outstate sales included if effected by local salesman.

Col. E.—(1) Deliveries in the state, excluding deliveries for out-shipment. (2) Ga. Ct. of Appls. held sole test to be "destination of goods" (92 S.E. (2d 548; revd. on other grounds, Ga. Sup. Ct. 95 S.E. 2d 848). (3) Includes deliveries to local purchasers. (4) See also Col. A, ft. (13). (5) Sales to customers in Tenn. (6) One element of local sale. (7) Controlling factor when shipment originated in same state.

Col. F.—(1) See Col. B, ft. (5). (2) One element of local sale. (3) Controlling factor when delivery is in same state.

Col. G.—(1) Receipts not used in allocation. (2) No detail as to sales receipts used. (3) No allocation provision. (4) See Col. A, ft. (7). (5) All sales or business transacted in state and half that transacted partly in and partly outside. (6) Residence or location of payor and place of manufacture.

***P-H, State & Local Taxes, All States Tax Guide, par. 1047.**

P-H CHART OF WAGE ALLOCATION FACTORS*

State (Col. 1)	Office Location: Chief Hdq. (Col. 2)	Local Branch (Col. 3)	Premises Owned (Col. 4)	Premises Rented (Col. 5)	Premises Maintained or Used (Col. 6)	Time Spent (Col. 7)	Mileage and Other (Col. 8)
Alaska						√ (1)	√ (1)
Ariz.						√	√ (2)
Calif.						√	
Conn.	√				√ (1)		
Del.						√	√ (7)
Ga.							√ (4)
Hawaii							√ (1)
Kan.	√						
Ky.	√						
La.						√ (2)	√ (2)
Md.						√	
Mass.		√	√	√	√		
Minn.		√					
Mont.		√				√	√ (6)
N. Y.	√ (1)				√ (1)	√ (3)	
N. C.	√				√ (1)		√ (5)
N. D.							√ (1)
Okla.	√					√ (4)	√ (1, 2)
Ore.						√ (2)	√ (1, 2)
Pa.		√ (1)			√ (2)		√ (1-3)
R. I.	√				√ (1)		
Utah		√	√	√			
Vt.	√ (1)				√ (1)	√ (3)	√ (6)

Col. 2. (1) N. Y., Vt.—If inequitable, volume of business or value of services or working time permitted. Col. 3. (1) Pa.—For indirect tax. Col. 6. (1) Place of business instate (Conn., N. Y., N, C., R. I., Vt.). (2) Pa.—For direct tax. Col. 7. (1) Alaska.—For certain transportation employees. (2) Alternate for salesmen on commission is sales. (3) N. Y., Vt.—Only if office location inequitable. (4) Okla.—For itinerant employees. Col. 8. (1) Based on instate work or services. (2) Based on mileage for certain transportation employees only. (3) For direct tax. (4) Based on residence of employee. (5) Only to extent paid or incurred instate. (6) Based on value of services if employee paid for results achieved; on volume of business if paid on that basis. (7) Del.—Compensation paid to employees within the state.

*P-H, State & Local Taxes, All States Tax Guide, par. 1048.

P-H CHART OF PAYROLL ALLOCATION ELEMENTS

State	Class of Employee Included (1)			Type of Compensation Included (1)			
	Officers	Directors	Independent Agents	Commissions	Bonuses	Board & Lodging	Other
Col. 1	Col. 2	Col. 3	Col. 4	Col. 5	Col. 6	Col. 7	Col. 8*
Alaska	(1)	(1)		√	√	(1)	√
Arizona	√			√	√	(1)	√
California	√			√	√	√ (2)	√
Connecticut	√						√
Delaware	(2)						√
Georgia	√		√ (1)	√		(1)	√
Hawaii	√			√	√	(1)	√
Kentucky	(2)			√	(2)	(1)	√
Louisiana	√			√			√
Maryland							√
Massachusetts				√	√		√
Minnesota	√			√	(3)	(1)	√
Montana	(3)	(2)		√ (1)	(2)	(1)	√
New York	(2)	(3)		√		(1)	√
North Carolina	(2)	(3)		√			√
North Dakota						(1)	√
Oklahoma	√						√
Oregon				√	(1)	(1)	√
Pennsylvania	√			√			√
Rhode Island	√						√
Utah	√			√			√
Vermont	(2)	(3)		√	(2)	(1)	√

[Footnotes] **General.** (1) See Column 8 and related comment. **Col. 2.** (1) Compensation paid to officers is specifically subject to withholding under state law and, by analogy, might be held to be within scope of allocable compensation. (2) Pay to executive officers is specifically excluded. (3) Compensation of executive and administrative personnel subject to withholding and probably includible in allocable income. **Col. 3.** (1) Specifically excluded from state withholding and, by analogy, probably not allocable compensation. (2) Mont.—"Administrative and executive personnel" are subject to withholding and payment may be allocable compensation. (3) Specifically excluded. **Col. 4.** (1) Paid to "agents". **Col. 5.** (1) **Mont.**—Compensation based on volume of business is allocating factor. **Col. 6.** (1) State withholding specifically covers bonuses. (2) Follows federal inclusion in gross income. (3) State income tax specifically includes bonuses as taxable compensation. **Col. 7.** (1) State income tax may treat board and lodging (subsistence) as taxable income in some cases. (2) Calif.—For allocation by seagoing personnel. Footnote (1) also applies. **Col. 8.** (1) Catch-all classification, such as "other compensation", might be extended to embrace some of the preceding types of compensation.

***P-H, State & Local Taxes, All States Tax Guide,** par. 1048.